IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

ROBERT L. MEYER, Administrator of the Estate of AMALIE MEYER, Deceased, ROBERT L. MEYER and ALBERT L. MEYER,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was rendered June 12, 1940 (Rec. Vol. II, page 1179). A motion for rehearing was filed in said court and taken under submission on June 27, 1940 (Rec. Vol. II, page 1193), and was denied by said Court July 23, 1940 (Rec. Vol. II, page 1209).

II.

JURISDICTION.

(a) The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accumulative Supp. 1925, 28 U. S. C. A. 347.

(b) The date of the judgment to be reviewed is June 12, 1940, and of the filing of the motion for rehearing, and the taking thereof under submission is June 27, 1940, and of its denial July 23, 1940.

(c) The fact showing jurisdiction has heretofore been set out in the petition, under the heading "Brief Statement of the Matter Involved."

(d) The judgment and decision of the Court of Appeals is set out (Vol. II, pages 1179 to 1191).

(e) The motion for rehearing filed in the Circuit Court of Appeals is set out in volume II, pages 1195 to 1207. The order of the Court of Appeals denying said motion for rehearing is set out at volume II, page 1209.

(f) The suggestion of death of defendant-appellant Amalie Meyer and the order of the Circuit Court of Appeals substituting her son, Robert L. Meyer, as administrator of the estate of Amalie Meyer, deceased, as defendant-appellant, in the place and stead of said Amalie Meyer, are both set out in volume II, pages 1176 and 1177.

III.

(a) On the question of a **proper** construction and interpretation to be placed upon a **general** Act of Congress, where there are subsequent **special** Acts, dealing with the subject

involved, (and in this instance, upon the Act of April 24, 1888, entitled "An Act to **Facilitate** the Prosecution of Works Projected for the Improvement of Rivers and Harbors" (25 Stat. 94), being Section 591 of Title 33, U. S. Code Annotated, and the **Special** Acts hereinbefore enumerated in said "Brief Statement of the Matters Involved," we direct attention to the following:

Townsend v. Little, 109 U. S. 504;
Rosecranz v. United States, 165 U. S. 257;
Rodgers v. United States, 185 U. S. 83;
Washington v. Miller, 235 U. S. 422.

(b) On the question of the exception taken to that portion of the instruction of the lower court, wherein the jury were directed that the Government was not liable for, and not required to compensate the owners, for the damage that might be done to the remaining 800 acres of defendants' land, due to permanently and constantly maintaining the natural level of the Illinois River to the high water mark, and that said defendants were **only** entitled to be compensated for any direct injury that was due to such permanent maintenance **above** the high water mark, and which instruction was held to be proper by the Court of Appeals (Vol. II, page 1191), we direct attention to the following cases:

U. S. v. Grizzard, 219 U. S. 180;
U. S. v. Cress, 243 U. S. 316;
U. S. v. Lynah, 188 U. S. 446;
U. S. v. C. B. & Q. Ry., 82 Fed. (2d) 131;
U. S. v. C. B. & Q. Ry., 90 Fed. (2d) 161.

Note: The last two cases above cited, reported in the Federal Reporter, involved **these very Acts** of Congress, authorizing **this** River and Harbor Project; one, reported in the 82 Fed. (2d), is the decision of the Circuit Court of Appeals for the **Eighth** Circuit, and the other, reported in

the 90 Fed. (2d), is the decision of **this** very **same** Circuit Court of Appeals for the **Seventh** Circuit; and on the question of damages, **each** of the said cases, involved damages to property not taken, but which would result from the **use** to be made by the Government of portion actually taken.

IV.

A brief statement of the case has been given in the petition under the headings "Brief Statement of the Matter Involved" and "Reasons Relied On for Allowance of the Writ," which, for brevity, we will here adopt.

SYNOPSIS OF THE ARGUMENT.

I.

(a) Your petitioners claim that in this particular River and Harbor Improvement, Congress, by the Act of April 24, 1888 (Title 33, Section 591, U. S. C. A.), merely selected the Secretary of War as the **proper** Government **officer,** authorized to institute condemnation proceedings in the name of the United States, for all River and Harbor Improvements, that it authorized to be prosecuted; and that such Act in and of itself, gave him no discretion whatsoever; and that the last eight words of said Act "for which provision has been made by law" when properly interpreted and construed, make it necessary to examine **each** special law, providing for a River and Harbor Project, in order to determine, WHAT land, right of way or materials, Congress deemed to be needed; and merely authorized the Secretary of War to condemn **such** land, as Congress has by such special law, either expressly, or impliedly, fixed as **necessary** for such project.

And that the Court of Appeals for the Seventh Circuit, has erroneously interpreted said Act, and is the first Federal Court to interpret it, as granting to the Secretary of War, **unlimited legislative** discretion, to condemn whatever land and right of way, or materials HE, in his own discretion, deems necessary for the project.

(b) That said Court of Appeals has also disregarded and given no proper consideration to the plain language of the several **special** Acts authorizing this particular project, which expressly direct, that this improvement shall be prosecuted, in accordance with the plans and recommendations of the Chief of Engineers and Board of Engineers for Rivers and Harbors, proposed and submitted to Congress, in the several **House Documents** specifically mentioned in

the enabling Acts of July 3, 1930, Public Resolution No. 10, 72nd Congress, and August 30, 1935; which said House Documents, the said Court of Appeals treated in its opinion, as mere "discussions of the legislation providing for improvements here concerned, between members of Congress and other Government officers," and held do not show an **intention** of Congress to limit, what the Court of Appeals interpreted to be, an unlimited legislative discretion granted the Secretary of War by the said Act of April 24, 1888.

(c) That said Court of Appeals has failed in construing and interpreting said **general** Act, and said special Acts of Congress, to follow the rulings of the Supreme Court of the United States applicable to the principle of construction and interpretation of a **general** law, when if standing alone, it will include the same matter as a **special** law, and thus conflict with it; and requiring that such **special** law shall always be considered an exception to the **general** law.

II.

That the charge to the jury excepted to by your petitioners is erroneous, which in substance announced, that the Government is not liable for any direct injury to the remaining portions of the unit farm property, which is inflicted upon that remaining portion, by the USE that it makes of the portion taken, if that use consists merely in changing and raising the natural flow and level of a navigable river, by constantly and permanently raising its level UP TO the high water mark; and that the Government is only liable for such a damage as is due to raising it **above** the high water mark.

That such an announcement of the law, is in direct conflict with the long-established decisions of this Court, and permits the taking of property without compensation.

ARGUMENT.

The statement of the questions involved, and of the reasons for granting the writ of certiorari, we will not enlarge upon, as we hope that we have made it clear in the brief summary contained in the petition.

A SUMMARY OF THE CASES CITED BY THE COURT OF APPEALS IN SUPPORT OF ITS RULING AND APPEARING AT VOLUME II, PAGE 1180.

An examination of the cases **cited** by the Court of Appeals in support of its conclusion, that the **general** Act of 1888 grants **unlimited** discretion to the Secretary of War, and that the **special** subsequent Acts, specifically authorizing this project, are to be treated as a mere "discussion of the legislation, between members of Congress and officers of the Government," discloses that **not one** of them ever attempts to interpret the scope and legal effect of the Act of April 24, 1888. They are set out in the opinion at page 1180 of volume II, and are the following:

1. Rindge Company v. County of Los Angeles, 262 U. S. 700.
2. Joslin Mfg. Co. v. City of Providence, 262 U. S. 668.
3. Sears v. The City of Akron, 246 U. S. 242.
4. Bragg v. Weaver, 251 U. S. 57.
5. Shoemaker v. U. S., 147 U. S. 282.
6. U. S. v. Gettysburg Electric Co, 160 U. S. 668.
7. Barnidge v. U. S., 101 Fed. (2d) 295.
8. U. S. v. Thelkeld, 72 Fed. (2d) 464.

The first, Rindge Company v. County of Los Angeles, deals with the Constitution and laws of the **State** of California, where lands had been condemned by the Board of

Supervisors of Los Angeles County, a **legislative** body of Los Angeles County, for a public road. The questions before the Court were **two**: First. Whether the **use** for which the lands were taken was a public use authorized by the law of **California**, and, second, whether the taking was necessary for such use.

The decision had nothing to do with the interpretation of the Federal law, and does not even mention, and, therefore, does not construe or interpret the Federal law of April 24, 1888.

The second, Joslin Manufacturing Co. v. The City of Providence, presents the question of whether or not, certain proceedings which were brought under an order of the **State** Legislature of the State of Rhode Island, purporting to authorize the City of Providence to obtain a supply of pure water, and which the plaintiff attempted to enjoin, claiming that it contravened the Fourteenth Amendment to the Constitution of the United States.

This case presented **no** facts dealing with Act of **Congress**, or authority under any Federal laws, and involved **merely** a question of whether the proceedings denied to the plaintiff due process of law. Of course, the general statute of April 24, 1888, was not even mentioned.

The third, Sears v. City of Akron, involved, in substance, the following: The State of Ohio had granted by a special law to the City of Akron the right to divert and use water power for the purpose of its water supply from certain rivers therein named. The City of Akron, already possessed under the general laws of Ohio, power to appropriate and condemn for city purposes, any property of any private corporation. The City of Akron, acting under that power, by resolution of its council, declared its intention to appropriate all the waters above a point fixed in one of those rivers, and by ordinance it appropriated the same and directed its solicitor to apply to the Court to assess

the compensation to be paid; and provided to pay such compensation out of the proceeds of bonds theretofore authorized.

A citizen of New York, John B. Sears, who was the holder and trustee of cetrain bonds that had been issued by a certain private hydroelectric corporation, organized under the general laws of Ohio, filed a suit to enjoin the City of Akron from carrying out the above, claiming that said hydroelectric company had the right of condemnation, and that if the city condemned the lands of certain riparian owners, that it would interfere with the future development and expansion of said hydroelectric company, and that the ordinance passed by the City Council, if enforced, is void, because violative of the Fourteenth Amendment to the Constitution, in that it authorizes the municipality to determine the necessity for the taking of private property, without the owners having an opportunity to be heard as to such necessity.

The above were the **sole** questions involved. The Federal Government was not interested, and no Federal officer was attempting to exercise any authority whatsoever, and, of course, the Act of April 24, 1888, was not even mentioned or considered.

The fourth, Bragg v. Weaver, was a suit wherein the owner of lands adjoining a public road in the State of Virginia sought an injunction against the taking of earth from his land, to be used in repairing the road. The taking was from the most convenient and nearest place where it could be attended by the least expense, and had the **express** sanction of the **statute** of the **State** of Virginia, and it was conceded that the taking was under the direction of the public officers, and for a public use, and also that adequate provision had been made for the payment of such compensation as may be awarded, and the objection against this statute is, that it makes no provision for affording the

owner an opportunity to be heard respecting the necessity or expediency of the taking, or the compensation to be paid. The Court held that where the intended **use** is public, the necessity and expediency of the taking may be determined by **such** agency and in such mode as the sovereign **State** may designate; that they are **legislative** questions, no matter who may be charged with their decision, and a hearing thereon is not essential to "due process," in the sense of the Fourteenth Amendment.

There was in that case, also, no necessity for, and no attempt made, to interpret a Federal law; the laws of the **State** of Virginia being **alone** involved. The Act of April 24, 1888, was, of course, not mentioned, and, therefore, was not interpreted.

The fifth, Shoemaker v. United States, the Court had before it **one** question, viz., **had** Congress the power to appropriate by condemnation, land in the District of Columbia for a public park in Washington, D. C. It was held that since **Congress** was exercising **that** power in the District of Columbia and not in a sovereign State (l. c. 298):

> "We are not called upon by the duties of this investigation to consider whether the alleged restriction on the power of eminent domain in the general Government, when exercised within the territory of a State, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia over whose territory the United States possesses not nearly the political authority that belongs to them as respects the States of the Union, but likewise the power 'to exercise exclusive legislation in all cases whatsoever over such districts.'"

The above case has no bearing **whatever** upon when, and under what circumstances, the **general** powers of the Secretary of War under the Act of April 24, 1888, shall **over-**

ride a **special** Act of Congress, and have significance, in determining the **extent** of lands to be acquired for a project.

The sixth, United States v. Gettysburg Electric Railway Company, is also far afield from the point under which it is cited and sheds no light whatever upon the **general** power of the Secretary of War under said Act of April 24, 1888. Quoting from Judge Peckham's opinion therein:

> "The really important question to be determined in these proceedings is whether the use to which the petitioner desires to put the land described in the petition is that kind of a public use for which the Government of the United States is authorized to condemn land. * * * 'Is the proposed use to which this land is to be put a public use within this limitation?' "

The Court decided that such **use** was a public use, and that **Congress** therefore had the power to authorize the condemnation of the land. There was no question as to the **amount** of land and the nature of the title, and estate that should be acquired, and therefore no necessity to refer to the **general** powers of the Secretary of War; and there was no leaving to the Secretary of War of a discretion or determination of **what** land, or how much land should be condemned. The Act of **Congress** was definite and certain, and the **sole** question of importance was whether the **use** was a public one.

The seventh, Barnidge v. United States, is likewise not in point and in no manner sheds any light upon **when** the **general** powers of the Secretary of War come into play, in determining the **extent** of the land authorized to be taken. The case is rather long, and, therefore, we will not summarize it. Furthermore, it did **not** involve the general powers of the **Secretary of War**, but was a condemnation suit instituted by the **Secretary** of the **Interior**, under an **express** power, granted under an Act of Congress of Au-

gust 21, 1935, Title 16, 461 U. S. C. A. ..., which declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States. It goes on to enumerate the **special** power and discretion given to said Secretary of the **Interior**, and, under provision (d), states:

> "For the purpose of this chapter he may acquire in the name of the United States, by gift, purchase or otherwise, any property, personal or real, or any interest or estate therein, upon having obtained the President of the United States' executive order, approving that determination."

The sole question raised in the suit, was whether or not the Act of Congress granting the Secretary of the **Interior** such power, was constitutional, raised by an owner who resisted the condemnation on three grounds: First, that the Historic Sites Act did not authorize the condemnation of land; second, that the **use** for which the land was sought was not a public use, and, third, that the Historic Sites Act was an unconstitutional **delegation** of legislative power.

The decision made by this United States Circuit Court of Appeals for the Seventh Circuit, construing the said Act of April 24, 1888, as a delegation to the Secretary of War, of **unlimited** discretion, is the **only** decision that has ever been made to our knowledge (and we have carefully searched), construing or interpreting **that** Act.

We believe that a fair and reasonable construction and interpretation of that Act, taking into consideration the **language** of the title, "An Act to **Facilitate** the **Prosecution** of Works Projected for the Improvement of Rivers and Harbors" is that it was never intended thereby to do anything more than select the department of the Government, the Department of War, and the Secretary of War as the individual **servant** of Congress, who would be authorized to

bring suits in the name of the United States for any lands, or right of ways, or materials, which **Congress** deemed were needed, for a River and Harbor Improvement; and that, therefore, in order to ascertain **what** land, right of way or materials **Congress** deemed necessary for a River and Harbor Improvement, it is necessary to look at the **Special** Act, that **authorizes** such a project (which was the interpretation of Judge Brown in the case of the United States v. Certain Lands in the Town of Narragansett, 145 Fed. 654); and that, therefore, the Court of Appeals for the Seventh Circuit in this case, entirely misconceived the **true** meaning and effect of said Act of April 24, 1888, and seems to have made this decision, upon a very narrow interpretation of the word "needed," upon which it has held, that this Act gave to the Secretary of War, unlimited discretion to decide what land, right of way or material **is** "needed," to enable him to maintain, operate or prosecute this particular work for the improvement of the Mississippi and Illinois River; and that such an interpretation as is made by said United States Circuit Court of Appeals leaves **totally** out of consideration the last eight words of said Act **"for which provision has been made by law."**

In the interest of brevity, we will not here again refer to the legal effect that should be given to the language and provision of each of the **special** Acts authorizing **this** particular River and Harbor Project, and that they **clearly** show, and in plain language, that the War Department, the Secretary of War, the Chief of Engineers, the Board of Engineers for Rivers and Harbors, in **each** of the **proposals** which they made to Congress, and recommended to Congress, distinctly intended, that only "flowage easements" should be taken in the lands that would be **flooded** and **damaged** by the string of dams; and that in estimating the **cost** of the **entire** project in their proposals, they were clearly representing to Congress that they were to take **only** such "flowage easement"; and, therefore, that Con-

gress never expected or intended to permit the Secretary of War to condemn **in fee,** hundreds of miles of land on both banks of the Mississippi and Illinois Rivers, that was only to be submerged by said pools; and certainly never intended that the Secretary of War, when instituting this proceeding to acquire land for this project, should take land that would not be submerged, but might, nevertheless, be "advantageous to the United States," and other departments of the Government for Wild Life Refuges, Recreational Parks and sites for future Riverside Scenic Highways, nor did Congress intend to appropriate money for any such purpose.

We will not again review, or argue, the error of the instruction given the jury, because an examination of the cases we have cited clearly shows that the Government was liable for all damage that it did to the balance of this unit farm because of the injurious **use** that it made of the portion taken.

At pages 1190 and 1191 the Court has cited in support of its opnion a number of decisions of this Supreme Court in support of its contention:

> "That there is no taking from a riparian owner by the Government when water is raised to the ordinary high water mark for the purpose of improving navigation. Whatever rights the owner possesses below ordinary high water mark, are subordinate to the rights of the public * * *. Consequently nothing is due for impairment or use by the United States in the improvement of navigation of property within or over the bed of its navigable water. Intangible riparian rights are subject to the same servitude. Under the Fifth Amendment mere damage to land not taken is not compensable as an act under the power of eminent domain."

For a complete **answer** to the above statements, we direct

your Honors' attention to the opinion of the United States Circuit Court of Appeals for the **Eighth** Circuit, written by his Honor, Judge Faris, 82 Fed. (2d) 131 (which as heretofore stated herein we have cited) and wherein each, every and all of the cases now cited by the United States Court of Appeals for the Seventh Circuit, are carefully analyzed, and an exact opposite conclusion drawn by the Circuit Court of Appeals for the Eighth Circuit from that stated by this Circuit Court of Appeals for the Seventh Circuit.

CONCLUSION.

It will thus be seen that the questions presented for this Court's consideration are questions of great importance. The question of the proper interpretation of the Act of April 24, 1888, as to whether or not, when properly interpreted, it grants to the Secretary of War an unlimited discretion, and the question of whether or not the subsequent Special Acts of Congress authorizing the improvement of the Mississippi and Illinois Rivers, which specifically direct that the work shall be prosecuted "in accordance with the plans and recommendations contained in the several House Documents, 290, 137 and 184," are to be interpreted in the light of the plain language of said three above-named House Documents; or whether they are to be deemed "mere discussions between members of Congress and other officers of the Government," and, therefore, shed no light whatever upon the **intention** of Congress; and also the question of whether or not the liability of the Government to compensate for the injury done to the remaining lands of the defendants, not sought to be acquired, but which are directly damaged by the **use** which the Govenment is making of the portions taken, is in conflict with the previous decisions of this Court.

We, therefore, earnestly urge upon the Court to grant the

writ, and review this record, and settle the questions involved, and reverse the decision of the Court of Appeals.

Respectfully submitted,

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